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No. 96-1974

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CREDICORP, INC., THE ESTATE OF JOHN RHEINFRANK, AND STEVAN W. BROWN, INDIVIDUALLY, AND AS VICE PRESIDENT OF CREDICORP, INC.,
Petitioners,

V.

DEPARTMENT OF BANKING AND FINANCE, STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Petitioners Credicorp, Inc. ("Credicorp"), the Estate of John Rheinfrank, and Stevan W. Brown (collectively, "Petitioners") have petitioned this Court in No. 96-1974 for a writ of certiorari to review the final judgment of the Supreme Court of Florida upholding, as constitutionally permissible under the Commerce Clause, Florida's statutory licensing scheme as applied to direct-mail marketers and Internet sellers with no nexus to the state. Respondent State of Florida Department of Banking and Finance ("Respondent") has filed its Brief in Opposition ("Brief in Opp."). Critically, Respondent's opposing brief merely underscores both the inherent "certworthiness" of the question presented and the propriety of summarily reversing and remanding this case to the Supreme Court of Florida.

I. RESPONDENT'S CLAIM THAT THE RETAIL INSTALLMENT SALES ACT IS A CONSUMER PROTECTION STATUTE ACCENTUATES THE NEED FOR THIS COURT'S REVIEW.

At the outset, Respondent attempts to obscure the importance of the central constitutional question presented by recasting the statute at issue, Florida's Retail Installment Sales Act (the "Act"), as a mere consumer protection statute designed to protect Florida credit consumers. After assuming this metamorphosis, Respondent then contends that no issue worthy of certiorari exists. Respondent's manipulation, however, stresses why this Court *should* grant review. It is precisely this facility to recharacterize a licensing scheme imposed upon a "no nexus" direct-mail marketer into a police-power-consumer-protection regulation that has led to the confusion among the lower courts illustrated by the very decisions in the courts below in this case. This Court should end the divergent approaches by granting review.

Moreover, Respondent's myopic attempt to focus solely on the "credit" aspects of the Act as a justification for "great local

concern" enhances, rather than eradicates, the need for this Court's review. Respondent contends that compelling a "no nexus" direct-mail marketer, like Credicorp, to pay the licensing tax, appoint an agent for service of process, and display a license, *before* it sells to Florida residents is constitutionally permissible because Credicorp also extends credit. (*See* Brief in Opp. at 11-13.) Respondent, however, fails to explain why the mere extension of credit removes these obvious restrictions on interstate commerce from Commerce Clause scrutiny. Indeed, Respondent appears to concede that the State of Florida could not, consistent with the Commerce Clause, impose these restrictions on an out-of-state seller that engages in cash, rather than credit sales. (*See id.* at 2, 14-15.)

Respondent quite simply fails to identify why the *extension* of credit should make any difference. For example, Respondent offers no plausible explanation as to why a direct-mail marketer or Internet seller must appoint an agent for service of process before it can sell to Florida residents. In making credit sales -- as opposed to collecting on credit sales -- it is Credicorp, not Florida consumers that assumes any risk. Significantly, this record does not suggest that Credicorp ever utilized the Florida courts or made any other efforts in Florida to attempt to collect debts.[1] Application of Florida's burdensome pre-sale restrictions, such as appointment of an in-state agent, on a "no nexus" direct-mail marketer before it can even sell its goods is anathema to this Court's Commerce Clause jurisprudence and

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[1] If Credicorp ships goods into Florida on credit but never receives payment nor attempts collection, there is no reason the police power of Florida should be invoked to protect the non-paying Florida consumer. The power of Florida to regulate interstate efforts at collection of debts in Florida is not implicated in this case, an important fact that makes this case an exceptional vehicle to clarify the protections the Commerce Clause extends with regard to pre-sale restraints. Even if there could be "local concerns" that justify use of police power to regulate collection-practice abuses in other cases, those concerns are completely absent from this record.

reinforces the need for this Court to exercise review in a summary fashion.

II. RESPONDENT IGNORES BOTH THIS COURT'S CONTROLLING AUTHORITY AND THE PROCEDURAL POSTURE OF THIS CASE.

Furthermore, Respondent's opposing brief is also telling by what it conspicuously omits. Respondent does not take issue with the direct conflict created between the Supreme Court of Florida's final judgment and this Court's authority, embodied in *Crutcher v. Kentucky*, 141 U.S. 47 (1891), and *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974), prohibiting state laws requiring purely interstate businesses to obtain a license and meet other "doing business" requirements before engaging in interstate commerce. As noted above, Respondent does not justify the requirement that "no nexus" direct-mail marketers must appoint an agent for service of process before soliciting credit sales. Respondent's inability to explain how the Act comports to the constitutional requirements of this authority warrants this Court taking summary action to reverse and remand.

Unable to challenge the importance and substantiality of the question presented, Respondent resorts to claims of procedural prematurity. Procedurally, however, Respondent admits that one issue is squarely presented for this Court's review -- whether states, consistent with the Commerce Clause, may require out-of-state sellers, with no substantial nexus to the state, to register and become licensed, pay a licensing tax, appoint an agent for service of process, and meet other requirements before they can sell to the state's residents. (*See* Brief in Opp. at 4-5, 8.) Respondent attempts to obscure this procedural clarity by noting that additional constitutional questions regarding the discriminatory effect of another Florida statute, the Loan Broker Act, were raised, out of necessity, at different times in the courts below and ultimately not reached by the Supreme Court of Florida. (*See* Brief in Opp. at 21-22.) While even Respondent concedes that this Court can choose to review this secondary

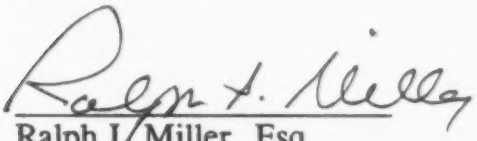
issue, see Brief in Opp. at 22, this procedural posture highlights the vitality of summary disposition. It is undisputed that the constitutionality of the Act as a pre-sale restraint is ripe for review. This case presents an excellent vehicle to address this single isolated issue. On this single issue, the Supreme Court of Florida erred. This Court can and should summarily reverse the final judgment and remand to the Supreme Court of Florida with instructions to consider the additional constitutional infirmities of the Loan Broker Act.

III. THE GROWTH OF INTERNET SALES JUSTIFIES THIS COURT'S REVIEW.

Finally, now is the time for the Court to act. As Respondent admits, the issue presented in this case will not simply go away as illustrated by its replication in the lower courts and subsequent requests for review by this Court. (*See* Brief in Opp. at 17-18.) The explosion of Internet usage further underscores the need for this Court's immediate attention. As the Court recently noted, the number of Internet users "is expected to mushroom to 200 million by 1999." *Reno v. American Civil Liberties Union*, ___ U.S. ___, 117 S. Ct. 2329, 2334 (1997). This "sprawling mall offering goods and services," *Reno*, ___ U.S. ___, 117 S. Ct. at 2335, that sells to Florida residents through cyberspace is subject to the same unconstitutional interference by the State of Florida as a seller, like Credicorp, that currently relies on the United States mail. Respondent's protestation that this is not an Internet case simply misses the point. This case is worthy of review because the unconstitutional provisions of the Florida Retail Installment Sales Act apply equally to Internet sellers and Credicorp alike.

In light of the inability of Respondent to face the issues presented in the petition, the need for review of the action below is indisputable. Indeed, Petitioner respectfully suggests that summary reversal and remand is now in order.

Respectfully submitted,



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August 14, 1997